No. 5634

United States Circuit Court of Appeals

For The Ninth Circuit

FAIRBANKS, MORSE & CO., a corporation,
Appellant,

—VS.—

LAKE UNION DRY DOCK & MACHINE WORKS,
a corporation, *Appellee.*

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

COSGROVE & TERHUNE,
Proctors for Appellant.
2002 L. C. Smith Building,
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THE ARGUS, SEATTLE

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

The appellee, Lake Union Dry Dock & Machine Works, a Washington corporation (hereinafter called the plaintiff), sued the appellant, Fairbanks, Morse & Co., an Illinois corporation (hereinafter called the defendant), upon an alleged trade acceptance (Paragraph III. of its complaint), reading as follows:

"Date June 2, 1927.

"No..... $8,000.00
266.66

$8,266.66

On Sept. 20, 1927, pay to the order of the undersigned EIGHT THOUSAND AND NO/100, together with six per cent interest from March 1, 1927, amounting to $266.66.

Value received and charge the same to the account of

LAKE UNION DRY DOCK & MACHINE WORKS,

By OTIS CUTTING, *Treasurer.*

H. B. JONES, *Secretary.*

To Fairbanks, Morse & Company,

Seattle, Washington.

Accepted June 2, 1927.

Payable at First National Bank of Seattle.

FAIRBANKS, MORSE & COMPANY,

By C. R. MILLER, *Agent.*"

Defendant's answer (Paragraph I. thereof) made denial as follows:

"Answering Paragraph III. of said complaint, said defendant denies each and every allegation therein contained; and alleges that if any such document was executed, that the said C. R. Miller, named in said purported document as agent of defendant, had no authority or right to make, execute and deliver or to accept said document, for or on behalf of the defendant, Fairbanks, Morse & Co. Defendant further alleges that if said document was so executed by the said C. R. Miller, it was without the knowledge or consent of the defendant."

Thus, in legal effect, the plaintiff alleges and the defendant denies that Miller had *actual* authority to

make, execute and deliver the said document in the name of the *defendant.*

It is generally held, and by the Washington statutes particularly provided, that the burden of proof upon such an issue was at all times upon the plaintiff.

BURDEN UPON PLAINTIFF

Acceptance

"The burden of proving the acceptance of a bill or order where denied is on plaintiff."

8 C. J. 997.

Execution by Agent

"Where commercial paper has been executed by an agent it is, as a general rule, incumbent on the holder to prove the agent's authority in order to render the principal liable, and the burden of making such proof is on the holder, although in some jurisdictions the authority of the agent need not be proved unless expressly denied in the answer."

The State of Washington, as the court will judicially know, has long since adopted the Uniform Negotiable Instrument Act. We quote two sections thereof as found in Remington's Compiled Statutes of the State of Washington:

Sec. 3409—Negotiable Instruments — Liability — Signature Necessary.

"No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable

to the same extent as if he had signed his own name."

Sec. 3410—Signature by Agent.

"The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency."

THIRD PERSONS MUST AT THEIR OWN RISK ASCERTAIN FACT AND EXTENT OF AGENCY

"It is, of course, a general rule that third parties dealing with an agent cannot rely upon the agent's assumption of authority, but must at their own risk, ascertain both the fact of agency and the extent of the agent's authority. The burden is upon them to show that the acts of the agent were within the scope of his authority * * * What comes within the apparent scope of an agent's authority, whether the agency be general or special, is determined by what is usual or necessary to the performance of the principal power; that is, what is necessary to effect the purposes of the agency."

O'Daniel v. Streeby, 77 Wash. 414.

Plaintiff did not plead an implied authority in Miller to execute the document; it did not plead that he signed the same within the apparent scope of his authority; and the complaint contains no allegations of estoppel or ratification. But if there were such allegations, the burden of proof would still be upon it.

The trial was had to the court without a jury, a written waiver thereof having been theretofore filed. At the close of the case a challenge to the sufficiency of the evidence and a motion to dismiss was denied (Trans. p. 81). Later, formal judgment was entered in favor of the plaintiff and against the defendant (Trans. p. 11). A motion for new trial (Trans. p. 7) was denied October 15, 1928 (Trans. p. 12). On the last mentioned date, defendant's bill of exceptions was certified (Trans. p. 86). From such judgment and trial rulings the defendant has appealed (Trans. p. 82).

ASSIGNMENTS OF ERROR (Trans. p. 83)

(1) The Court erred in admitting Plaintiff's Exhibit 5. Said exhibit is in words and figures as follows, to-wit:

"No. ..... Date June 2, 1927.

$8,000.00

On Sept. 20, 1927, pay to the order of the undersigned Eight Thousand and No.....Dollars, together with six per cent interest thereon from March 1, 1927, amounting to $266.66.

Value received and charge the same to the account of

LAKE UNION DRY DOCK & MACHINE WORKS,

By OTIS CUTTING, *Treasurer.*

H. B. JONES, *Secretary.*

To Fairbanks, Morse & Co.,
Seattle, Wash.
O. K.—KUPPLER.
Accepted: 6/2/1927
Payable at.....
(Specify Bank or Address)
FAIRBANKS, MORSE & CO.,
By C. R. MILLER, Agent."

At the opening of the trial plaintiff offered Plaintiff's Exhibit 1, to which defendant objected as follows:

> "I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company."

It was admitted, with an exception allowed.

The witness Jones then testified concerning certain statements said to have been made by Kuppler, to which the defendant objected,

> "on the ground that there is no showing that Mr. Kuppler had any authority of any kind whatever to make any statements."

Jones further testified, and Plaintiff's Exhibit 3 was offered and admitted,

> "notwithstanding the defendant making the same objections heretofore made."

Upon Plaintiff's Exhibit 4 being admitted, defendant objected, saying:

> "May we, without bothering the Court, counsel and witness, have these objections run to all of these documents?"

to which the Court replied:

"Same objection may run to all. Proceed."

Plaintiff's Exhibits 5, 6 and 7 were offered together, and the Court announced concerning the same:

"The same ruling. Objection noted the same as before.

MR. COSGROVE: Yes, continue these same objections the same as before and exceptions to the Court's rulings.

THE COURT: Yes."

Of the above mentioned objections, the following is particularly applicable to Plaintiff's Exhibit 5:

"I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company."

(2) The Court erred in denying defendant's challenge to the sufficiency of the evidence and its motion to dismiss the action.

ARGUMENT

ASSIGNMENT OF ERROR No. 2 (Trans. p. 85)

"The Court erred in denying defendant's challenge to the sufficiency of the evidence and its motion to dismiss the action."

There was no substantial evidence, or any evidence, that Miller had defendant's *actual* authority to accept and deliver said trade acceptance in its name.

Even if the issue had been one of execution and delivery with implied authority, or execution within the apparent scope of authority, the challenge and motion would have been well taken, for there was no substantial evidence, or any evidence, showing that Miller so executed and delivered said document.

It does not seem necessary for us to pick the evidence to pieces in order to show the absence of the specified and required evidence. Nevertheless, we do hereby search the record for the missing evidence.

The defendant, beginning business in Chicago, in 1858, is a corporation of the State of Illinois, with its principal place of business at Chicago. It is engaged in the manufacture of Deisel engines, scales, steam pumps, electrical equipment, selling and distributing the same through local sales offices, twenty-six or thereabouts, and five or six abroad (Trans. p. 37). Mr. A. W. Boughey from the defendant's home office, one of its directors, secretary and treasurer for twenty-five years, describing the business of the company, said that at Seattle it was done through its local sales manager, C. R. Miller, who was in charge of the local sales office.

> "He sold the goods for us and looked after the installation of the goods, looked after the servicing of the goods and collected the proceeds and paid the proceeds into a treasurer's account in a local bank here that we in Chicago drew against and he could not draw against; that ended the transaction. When he wanted any money he wrote

a letter to Chicago every week, specifying how much he might require for the next week, and we opened a local account in his name under which he paid those remittances and against which he drew checks for expenses for freight, that is, including his salesmen's wages and his office help; all that money was obtained from Chicago upon his written requisition."

Upon inquiry by the Court:

"When goods were sold and not paid for in cash, who arranged for the security or payment?"

the witness replied:

"If the local manager did not collect in cash he got a note and those notes would be sent to Chicago for endorsement or for discount by them. He had absolutely no right to discount notes here or sign endorsements, and never did.

"Not to my knowledge did the company purchase any claims against other people through the local office." (Trans. p. 38, 39)

He had previously testified that he knew the authority of the Seattle manager during the year preceding June 2, 1927, which was predicated upon his association as director and secretary of the defendant for nearly twenty-five years (Trans. p. 37). He identified, and there was admitted in evidence, the by-laws of the company in effect June 2, 1927, marked Defendant's Exhibit "A-1" (Trans. p. 38).

The plaintiff was a corporation of the State of Washington, with its principal place of business at Seattle, and Jones, McLean and Cutting were, re-

spectively, its secretary and attorney, president and principal owner, and vice-president and general manager. The Sterling Steamship Corporation owned the vessel "Ethel M. Sterling." Its president and treasurer were, respectively Ray M. Sterling and W. R. Kuppler. Kuppler appears to have been also the local credit manager of the defendant. His relationship to the Sterling Steamship Corporation, particularly his stock ownership therein, was not known to the defendant (Trans. p. 43).

Plaitiff's witnesses were Jones, Kuppler, McLean, Cutting and two telegraph company superintendents. In our analysis of the evidence made in our search for evidence of Miller's authority, we divide the whole into parts, as follows:

KUPPLER'S TESTIMONY AND ASSURANCES

The Court in its oral opinion referred to Kuppler's testimony as follows:

> "The plaintiff was lead to believe from the statements of the credit man of the defendant, the treasurer for the owners, that the defendant would take care of the claim of the plaintiff. This assurance on the part of the credit man of course was unauthorized by the defendant." (Supplemental Trans. p. 2)

TRANSACTIONS OF MAY 31, 1927

Jones, secretary and attorney of the plaintiff, said:

> "I had a claim to collect of eight thousand dollars balance due for repair work performed by

plaintiff on the 'Ethel M. Sterling,' formerly the 'Hawaii' (Trans. p. 13) * * * Our interests in relation to the vessel was the unpaid repair bill which was an obligation of the Sterling Steamship Company. The vessel sailed from the dock about the 1st of January, 1927. At that time all of the work on the vessel, to which I have made reference, had been completed, nothing thereafter being done upon her and entering into this matter whatsoever. * * We made no effort to libel the vessel for this unpaid bill before she left Seattle. * * * After the vessel left Galveston, she went to the Hawaiian Islands * * *." (Trans. p. 22)

Kuppler, plaintiff's witness, said:

"There was not then pending any going business relations between the defendant and the plaintiff." (Trans. p. 29)

Jones, seeking to collect plaintiff's claim against the Sterling Steamship Corporation, knowing that defendant had a mortgage on the vessel, and that she was then in the port of Galveston loading for Hawaii, called upon Kuppler, Jones saying:

"I caused an inquiry to be made and ascertained that the ship was due to leave Galveston on the 4th of June. McLean and I then called on Kuppler about the last of May. I then told Kuppler we had firmly made up our minds we would not let the ship leave Galveston without libeling her for our bill. * * *" (Trans. p. 16)

Kuppler took his visitors to Mr. Miller, to whom Jones said:

"I told Miller we would not let the ship leave

> Galveston without libeling her for our bill * * * I told him that we were going to insist on the payment of the bill or guarantee of the bill. He then said he would like to have a day or two to refer the matter to his people, and I told him that we would give him time, I think it was about two days. It is my recollection that I asked Mr. Miller at that time if it was necessary for him to do that and he said that it was not absolutely necessary, but he would like to do it." (Trans. p. 17)

He further told of Miller's indignation and surprise.

> "Then on the 2nd of June Mr. Kuppler called me up and said that they would go ahead—or that they would guarantee our claim. * * *" (Trans. p. 17)

Jones told Kuppler

> "The plaintiff had an obligation of ten thousand dollars to meet on June 20th, and that it was very essential that it have these funds in hand on or before that time." (Trans. p. 14)

McLean's idea of the situation is found in his statement:

> "We were not satisfied at the delay attached to these payments (referring to the delay of the Sterling Steamship Corporation) and insisted that defendant, being a large national outfit and having such a large claim against the vessel, could well afford to take care of our little claim and be in full control of the boat." (Trans. p. 32)

So far we see no evidence of Miller having any authority to accept the trade acceptance.

MILLER-THOMPSON RELATIONSHIP

Thompson was described by Kuppler as the Pacific Coast Manager of the defendant, with offices at Los Angeles. He was asked by plaintiff's counsel:

> "So that Mr. Miller here reported to Mr. Thompson?
>
> A: Yes, sir." (Trans. p. 25)
>
> "What was the limitation if you know, of the local manager in the execution of sales contracts?
>
> A: Why, he would approve contracts up to five thousand dollars—and copies of those contracts would go to the home office, as well as to the Pacific Coast Manager's office at Los Angeles at that time. Beyond that between five and ten, they must have the approval of the Pacific Coast Manager, at Pacific Coast Manager's headquarters, and in excess of ten thousand they had to go to Chicago as well as to the Pacific Coast Mananger, but the contracts, regardless of amounts, are always approved by the local manager after they O. K.'d or initialed by the other higher executives if they succeed, regardless of the amount." (Trans. p. 31)

It must be observed that the question and answer related to *sales* contracts, and did not relate to purchases, expenditures, investments or the execution of negotiable instruments.

Miller described the business at the local office and his connection with it, particularly saying that the business was that of selling merchandise—his duties were to see that the goods were sold, and installed, if sold that way, and the necessary service given to

them; also to see to it that the accounts were collected and the records kept.

"Q: To whom did you report, if to anyone—to whom did you make reports of your business?

A.: Well, I reported to Mr. Thompson, Mr. A. W. Thompson, the Pacific Coast Manager, at that time located at Los Angeles.

"We sent our statement of accounts to the home office. To pay our expenses it was necessary for me to obtain our money from the Chicago office, and that was done in the form of a requisition. They would send me a check and I would deposit it in an account in the First National Bank. I did not have to go through Mr. Thompson for that. This account was in the bank carried under my name as agent. The moneys received from collections were deposited in the same bank in the name of the defendant, what we called a corporation account, over which I had no control whatever. It was a home office account." (Trans. pp. 44, 45)

We have hereinbefore repeated Mr. Boughey's description of Miller's duties and authority.

From the foregoing, we find Miller wholly controlled as to his expenditures and use of money by the Chicago office. True, to Thompson at Los Angeles, he made reports of his business, but that admission does not suggest any authority in either Thompson or Miller to accept a trade acceptance in behalf of the defendant.

TELEGRAMS BETWEEN MILLER AND THOMPSON

Apparently after the Jones call on Kuppler and Miller on May 31st, Miller wired to Thompson, defendant's Pacific Coast Manager at Los Angeles:

> "Refer my letter twenty-first regarding Sterling Steamship account of the eleven thousand dollars libel claims mentioned Lake Union Dry Dock Company have claim eighty-one hundred thirty dollars which must be paid by June twentieth vessel now Galveston loading cargo for Hononlulu and Lake Union people threaten to libel June second unless we agree to pay their bill on or before June twentieth stop we stand to lose heavily if we permit libel proceedings and I suggest that we assume Lake Union bills, taking proper assignment, thus permitting vessel to proceed if this meets with your approval we will advise Lake Union people accordingly otherwise if you wish further information suggest telephoning me as they must have our answer Thursday morning." (Trans. p. 63)

Thompson appears to have answered by wire (Plaintiff's Exhibit 10, Trans. p. 66), as follows:

> "Does not your preferred mortgage on vessel if over two hundred gross tons protect it against libel proceedings conformity Jones Bill answer immediately."

to which Miller appears to have replied:

> "Lake Union Drydock claim represents unpaid balance of their bill for repairs to vessel and engine foundations contracted prior to our mortgage and delivery of engines our attorneys advise

their claim is prior to our mortgage." (Trans. pp. 66, 67)

Plaintiff's Exhibit 8 appears to be the reply of Thompson, dated June 1, 1927, reading:

> "Referring to Sterling Steamship Corporation with your knowledge of existing conditions and contact with competent legal advice matter must be left to your good judgment stop bear in mind that we are loath to increase our investment, but must not under any circumstances jeopardize the sum now involved stop exhaust every effort to minimize our investment stop have you considered executing non-interest bearing guarantee of payment at four to six months as preference to immediate cash outlay." (Trans. p. 62)

The Court, in its oral decision, said that Miller, the manager, said to Jones that he (Miller)

> "had no authority to make an adjustment, that he would have to take the matter up with the officers of the company, and thereupon communicated with Thomas at Los Angeles and was authorized by Thomas to make the best adjustment that could be obtained, exercising his best judgment as to what to do, * * * I feel convinced beyond a reasonable doubt that the execution of the trade acceptance by Miller was authorized by Thomas, who was empowered to give the authorization, * * *" (Supplemental Trans. p. 3 v 5)

There is not a single word of evidence anywhere in the record showing that Thompson had any authority to make, execute and deliver in the name of the

defendant any trade acceptance, or to delegate that power to Miller or anyone else. When the lower court stated that Miller was authorized by Thompson to make the best adjustment that could be obtained, it probably had in mind the telegram of June 1 (Plaintiff's Exhibit No. 8, Trans. p. 62), which began as follows:

> "Referring to Sterling Steamship Corporation with your knowledge of existing conditions and contact with competent legal advice matter must be left to your good judgment * * *"

But that is not all there was to the telegram. Thompson, after writing the foregoing, apparently thought it best to qualify himself and said:

> "bear in mind that we are loath to increase our investment, but must not under any circumstances jeopardize the sum now involved * * *"

After writing this, he added another qualification:

> "exhaust every effort to minimize our investment,"

and finally, having doubt about all of these suggestions which he had made, asked:

> "have you considered executing non-interest bearing guarantee of payment at four to six months as preference to immediate cash outlay."

Now, just what authority did Thompson pass to Miller? Was it to use his judgment, invest no more money, reduce the investment, or was he to consider a non-interest bearing guarantee? Obviously, Miller received no authority to do any particular thing. There was nothing in the exchange of telegrams between Miller and Thompson suggesting the purchase

of a claim against the Sterling Steamship Corporation and the execution of a trade acceptance. Thompson's suggested guarantee is not a suggestion of a direct promise to pay.

At this point, it is well to note that the evidence does not show this telegram ever having been shown to anyone representing the plaintiff. Jones did not ask Miller to wire for authority; he did not ask if he had authority; he said Miller told him he did not have authority. Even that did not seem to disturb him, for he said:

> "I told him that we would give him time, I think it was about two days." (Trans. p. 17)

If the plaintiff is relying upon the Thompson telegrams as the foundation of Miller's authority, it should prove:

(a) that the telegram purports to delegate the claimed authority.

(b) that Thompson had authority to delegate to Miller the claimed authority.

The telegram at best is ambiguous and full of doubt. No one can say that it purports to grant to Miller any authority whatever. If it did, there is no evidence to show that Thompson had any authority to delegate. On the contrary the evidence of Mr. Boughey shows that the defendant, through its by-laws had taken great pains to prevent the execution of negotiaable instruments by anyone except its highest officials. Thompson and Miller were not among such. They were sales agents; not officials.

NEGOTIABLE PAPER—AUTHORITY TO EXECUTE

"Commercial paper, such as bills, notes and checks, passes current to a limited extent like money, and accordingly power to an agent to execute or endorse it is to be strictly limited, and will never be lightly inferred, but ordinarily must be conferred expressly. The most comprehensive grant, in general terms, of power to an agent conveys no power to subject the principal to liability upon such paper unless the exercise of such power is so necessary to the accomplishment of the agency that such intent of the principal must be presumed in order to make the power effectual. Thus such power is ordinarily not to be inferred from authority to adjust all of the principal's accounts and concerns as he could do in person, or to exchange, buy, sell, collect, or loan for the principal, or to collect debts and execute deeds, *or from a general authority to manage a business*, unless such authority is necessarily implied from the peculiar circumstances of the particular case and is indispensable to the proper execution of the authority granted."

2 C. J. 636;

In the case of *Coleman v. Seattle National Bank*, 109 Wash. 80, we find that an alleged agent had from the principal a letter signed by the principal, reading as follows:

"This is to certify that the bearer, Mr. R. S. Towse, is an authorized representative of the Spalding Fruit Company, and is hereby authorized to transact any and all business for said company."

The Court said:

"Looking to the seeming broad and comprehensive character of this writing as an agency appointment without thought of that particular branch of the law of agency touching the execution and issuance, and the transfer by endorsement—and thereby is in effect, the issuance—of negotiable paper by an agent for his principal, the writing might seem to confer upon Towse authority to endorse and transfer the check to the publishing company; but we think a consideration of this branch of the law of agency will readily render a claim that the language of this agency writing, as general and seemingly broad as it is, did not confer upon Towse the authority to so endorse and transfer the check. It takes something more than such general language to create such an agency. This because of the peculiar nature of negotiable paper and the rights and liabilities arising from its issuance. In one Mechem, agency (2nd Ed.), at Sec. 969, that learned author says:

" 'The power to bind the principal by the making, accepting or endorsing of negotiable paper is an important one, not lightly to be inferred. The negotiable instrument, in our law, is a contract which stands upon an independent footing. It is designed by its nature to circulate freely in the business world, and may come to persons and places far remote from those of its creation. It may confer upon a subsequent holder rights to which his defenses are unavailing. The author-

ity to create such obligations is obviously a delicate one, easily susceptible of abuse, and, if abused, bringing disaster and financial ruin to the principal. Our law, therefore, properly regards such an authority as extraordinary, and not ordinarily to be included within the terms of general grants; and the rule is absolutely established that it can exist only when it has been directly conferred or is warranted by necessary implication.' "

The Court then quoted approvingly the text of 2 C. J. 636, *supra.*

AUTHORITY TO SELL—NO AUTHORITY TO BUY

"Authority to sell of itself furnishes no authority to buy."

2 C. J. 588.

AN AGENT TO SELL—IMPLIED POWERS

"An agent to sell has no implied powers beyond those which are usual and necessary to the accomplishment of the sale, nor can he bind his principal beyond the limitations of his authority, of which the purchaser has actual or constructive notice. Thus, a mere power to sell, personally does not confer on the agent authority to purchase; or to borrow money."

2 C. J. 595.

AUTHORITY TO OPERATE RANCH—NO AUTHORITY TO BORROW OR EXECUTE PAPER

"Authority of agent to operate ranch did not

include authority to borrow money and execute negotiable promissory notes for the owner."

Security State Bank v. Adkins, 134 Wash. 94.

EXTENT OF AUTHORITY IN GENERAL

"Not only does the burden of proof as to the fact of agency rest with one who seeks to charge another as principal with the acts of an alleged agent, but the burden also rests with him to prove the extent of the agency; in other words, the burden is upon him to show that the act or acts of the alleged agent were within the scope of his authority. * * *"

2 C. J. 925.

TO MAKE CONTRACTS OF GUARANTY AND SURETYSHIP

"The power to make a contract of guaranty may be expressly given, * * * but such authority ordinarily is not to be implied from a general agency of any kind, such as the power to buy or sell, unless it is a usual or necessary incident to the particular power granted, or unless it may be implied from the conduct of the parties."

2 C. J. 665.

IMPLIED AUTHORITY

"Implied authority is that authority which the principal intends his agent to possess, and which is proper, usual and necessary to the exercise of the authority actually granted, or which is implied from the conduct of the principal, as from his previous course of dealing, or from his con-

duct under circumstances working against him an equitable estoppel."

2 C. J. 576.

DUTY OF THIRD PERSON

"A person dealing with an agent must not act negligent, but must use reasonable diligence to ascertain whether the agent acts within the scope of his powers."

Bowles Co. v. Clarke, 59 Wash. 336.

DUTY OF THIRD PERSON TO ASCERTAIN AUTHORITY

"It appears from the above rules that as a general rule every person who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon his inquiry, and must discover at his peril that it is in its nature and extent sufficient to permit the agent to do the proposed act, and that this source can be traced to the will of the alleged principal, particularly where he is dealing with an agent whose authority he knows to be special, or where it is the first transaction with the agent, or the circumstances connected with the agency are such as to put him on inquiry."

2 C. J. 562.

KNOWLEDGE IN GOOD FAITH OF THIRD PERSON

"It is also necessary to the application of the above general rule that the person dealing with the agent was aware of the principal's acts from which the apparent authority is deduced, and that he dealt with the agent in reliance thereon,

in good faith, and in the exercise of reasonable prudence."

2 C. J. 575.

TRANSACTIONS OF JUNE 2, 1927

Jones said:

"Then on the 2nd of June Mr. Kuppler called me up and said that they would go ahead—or that they would guarantee our claim. He said, 'We don't want to pay it by the 20th of June and we don't want to pay interest on it.' I told him that matter rested with Mr. McLean, who was then in Portland. I gave Kuppler his telephone number or his address." (Trans. pp. 17, 18)

Jones then said that McLean wired him on June 2nd, saying:

"that anything that was satisfactory as a guaranty to the bank to enable them to raise money would be accepted; that I could act on anything that was acceptable to the bank, if I could put it in the form acceptable to them. I went over to the First National Bank and told Mr. Philbrick what we were proposing to do. We determined to put it is in the form of a trade acceptance, so I called Kuppler back and told him that Philbrick had suggested that the simpler way to handle it would be to put it in the form of a trade acceptance. Kuppler said for me to take it up with Mr. Josiah Thomas, who was then attorney for the defendant company, and if he were agreeable to it, it would be all right. I took it up with Mr. Thomas and explained what we proposed to

do. Thomas subsequently said it was all right, to go ahead that way. So I prepared a trade acceptance, accompanied by an assignment of our claim * * * I took the trade acceptance, the assignment and this letter, Plaintiff's Exhibit 6, and called on Mr. Kuppler at the defendant's Seattle office, and showed him the trade acceptance, the assignment that I had prepared, also letter to the bank. * * * Mr. Kuppler figured the interest at $226.66 and added it in red rink on the trade acceptance; also his own initials. * * * Kuppler took me over to Miller's office, explaining the situation to the latter, the way the amount was arrived at, the method I proposed to handle it by, putting the assignment in escrow with the bank." (Trans. pp. 17, 18, 19)

"The suggestion was made either by Kuppler or Miller that I should turn the assignment over to them absolutely inasmuch as they were giving us their trade acceptance. After some discussion I did so; I did not use the letter to the bank. The trade acceptance was then signed by Miller, who signed as Fairbanks, Morse & Company by C. R. Miller, agent." (Trans. p. 20)

"I did not know on June 2nd, 1927, and do not now recall any other pending business relations between the plaintiff and the defendant." (Trans. p. 24)

"I knew Mr. Miller was the local manager of the defendant company. * * * The plaintiff corporation, prior to June 2nd, 1927, had never had any experience in the matter of the sale of

any claim to the defendant company, nor had it obtained any trade acceptance from anyone purporting to represent the defendant, and had no information which would lead me to believe that Mr. Miller had ever previously accepted any trade acceptance. I knew in a general way that the defendant company was engaged in the manufacture and sale of machinery, particularly engines." (Trans. p. 23)

These transactions show absolutely nothing evidencing any authority in Miller to make, execute and deliver the trade acceptance in the name of the defendant.

DEFENDANT'S BY-LAWS PROHIBITED EXECUTION OF NEGOTIABLE INSTRUMENTS BY EMPLOYEES SUCH AS MILLER

Sections III. and IV. of Article VI. of the By-laws of defendant, in effect on June 2, 1927, follow:

"SECTION III. No note, acceptance, or other obligation of the corporation for the payment of money (other than checks) shall be valid unless signed in the name of the corporation by the President, or in his absence or inability to sign, by a Vice-President, and countersigned in either event by the Treasurer, countersigned by the Secretary, and in the event of the absence or inability of both the President and a Vice-President, then such note, acceptance or obligation may be signed in the name of the corporation by the

Treasurer and countersigned by the Secretary, provided, however, the Board of Directors may, by resolution, authorize any bank or banks of de-deposit of this corporation to accept as valid notes, acceptances or other obligations of the corporations for the payment of money (other than checks) if signed in the name of the corporation by the President or a Vice-President and countersigned by the Treasurer or Secretary, or if signed in the name of the corporation by the Treasurer and countersigned by the Secretary."

"SECTION IV. No officer, agent or employee of this corporation shall sign this corporation's name as guarantor or surety upon any bond, note, contract or other instrument of any person, firm or corporation, and any such guaranty or obligation, executed in the name of the corporation shall be null and void, but nothing herein contained shall preclude the proper officer from executing as herein provided, in the name of the corporation, as principal, any bond, note, contracts or other instrument, or when authorized by a resolution of the Board of Directors of guaranteeing in the name of the corporation the payment of notes or other obligations of another corporation of which the entire capital stock is owned by this corporation." (Trans. pp. 68, 69)

TRANSACTIONS AFTER JUNE 2, 1927

Kuppler, on June 10th, in a letter to Dierks, Assistant Secretary of the defendant company at Chicago, told the story of the Sterling Steamship Corporation

account, etc., and as a part of the same reported the making and delivery of the trade acceptance (Defendant's Exhibit A-2, Trans. pp. 70, *et seq*). Boughey said this letter arrived in Chicago June 14, 1927.

> "The letter of June 10th is the first information I had in connection with the trade acceptance mentioned in plaintiff's complaint; if it had been brought to the attention of any of the officers of the home office prior to June 10, it would have come to my attention. * * * (Trans. p. 40). This letter was considered by the president, general credit manager, vice-president and treasurer and myself. Mr. Kiddoo was the vice-president and treasurer of defendant and the general credit manager's name was F. C. Dierks, who held these positions in June and July of 1927. Upon receipt of the letter just mentioned Mr. Dierks and Mr. Kiddoo made a visit to Seattle to investigate the whole matter and discussed what was the best thing to settle the whole matter; that is what they came for, to settle the whole matter after they had ascertained all the facts. At the time said letter of June 10th came in, the home office had not had any knowledge of any trade acceptance such as the one pleaded in the complaint." (Trans. pp. 39, 40)

On July 7, 1927, the defendant, through its attorneys, Cosgrove & Terhune, wrote the First National Bank of Seattle and the plaintiff, disavowing the execution and delivery of said trade acceptance by Miller in its name, and announcing its readiness to return the so-called claim assignment to the party to whom it

might belong (Defendant's Exhibit A-4, Trans. p. 79). Mr. Philbrick, for the bank, admitted the receipt of the letter of July 7, 1927 (Trans. p. 42). Plaintiff admitted receiving this letter about July 7th (Trans. p. 50).

DID MILLER HAVE IMPLIED AUTHORITY TO EXECUTE THE DOCUMENT? WAS IT EXECUTED BY HIM WITHIN THE APPARENT SCOPE OF HIS AUTHORITY?

Although these questions are beside the true issues of the case, we, nevertheless, call attention to the following facts:

Miller was a local sales manager; Thompson was a local sales manager. Miller had never theretofore purchased any claim such as the plaintiffs, or accepted any trade acceptance. There was no evidence that the local office or any other office of Fairbanks, Morse & Co. had done so. The home office control of Miller's expenditures and disbursements, its carefully prepared by-laws all show that it was not only not necessary to the main purpose of the business that either Miller or Thompson have authority to execute trade acceptances in the name of the defendant, but that such was positively prohibited, the by-laws declaring void all such documents unless executed by those particular officials named therein and in conformity thereto. There was then no pending business between the plaintiff and the defendant. There had been no past business between them which warranted plaintiff in believing that Miller had authority to execute said trade acceptance.

This is not a case of an unincorporated plaintiff—

a person ignorant, unable to read or write, imposed upon and over-reached by a soulless corporation. On the contrary, the plaintiff is a corporation, as is the defendant. Its officers are men of experience and capacity. They knew the defendant was a manufacturing and sales corporation, with its home office in Chicago. Plaintiff had an account against the Sterling Steamship Corporation. Whether it had any priority over defendant's preferred mortgage is not certain. So far as is known, the defendant has never admitted it, notwithstanding Kuppler's conversations. The plaintiff needed money badly, and it saw a chance to get it by scaring the local representatives of the defendant. There was no effort made by Jones to inquire as to Miller's authority. The suggestion that Miller wire to his officials was made by Miller, not Jones. At that very moment, when Miller was beseeching the privilege of wiring, and Jones was giving him two days grace, the so-called assignment of the claim was already executed, it bearing the date May 31st (Trans. p. 62).

PHILBRICK'S WARNING TO JONES

Philbrick, the banker, on or about the last of May, warned Jones as follows:

> "I told him that the acceptance should be accepted by the defendant by an authorized officer of the company. I told him that the paper we had had in the past had always been endorsed by Fairbanks, Morse & Company by Mr. Miller, treasurer of the company at Chicago, which Mr. Miller is not Mr. C. R. Miller." (Trans. p. 42)

From the foregoing it is seen that the plaintiff, through its representatives, descended upon the defendant's local officers demanding and threatening. The defendant was not doing business with plaintiff, and was not looking for any business. The demands and the threats and the force may have been within the law, but even so they represented compulsion. The act of Miller in signing was the result of coercion. The plaintiff ought not to be heard to say that it relied upon any implied authority, or that it believed that Miller was acting within the apparent scope of his authority, particularly for the reason that it was responsible for Miller's execution of the document.

DISAVOWAL

Upon receipt of the Kuppler letter of June 10th, the home office sent its vice-president and its assistant secretary to Seattle to investigate and settle the whole matter (Trans. p. 39). The court in its oral announcement stated that these gentlemen were sent "to pay." Obviously the court did not understand the meaning of the word "settle" as used by the witness. Upon the facts being ascertained, the letter of July 7th followed (Trans. p. 79).

RE STATUS QUO AND TENDER BACK

The court in its oral announcement seemed to feel that there was some delay in attempting a tender back. It must be remembered that the home office of the defendant did not know anything about this transaction until about June 14th, at which time it sent its officials to the west to investigate, and on July 7th the

disavowal letter was sent out. This was not an unreasonable length of time, and furthermore, no damage is claimed to have come to the plaintiff by reason of such passage of time. If the plaintiff had a lien against the vessel "Ethel M. Sterling," it could have enforced the same in the Hawaiian courts as well as at Galveston. The difficulties of a return to *status quo* were all created by the plaintiff itself. It ought not to be now finding fault.

At the time when the disavowal letter was being written, it was impossible to determine the true owner of the open account; therefore, the defendant gave written notice to both the plaintiff and the bank that it was ready to deliver back the assigned claim to the one to whom it belonged. Very little more could have been done by way of tender. That which the plaintiff left with Miller was nothing more than an assignment of its open account against the Sterling Steamship Corporation. When plaintiff received the notice of disavowal, there was nothing to prevent it from proceeding toward the collection of the claim just as if it had never made an assignment. The return of the document was not necessary.

ASSIGNMENT OF ERROR NO. 1 (Trans. p. 83)

At the opening of the case, the court, over the objection of defendant, admitted Plaintiff's Exhibits 1, 2, 3 and 4, the defendant continually calling attention to the court that the documents had not been brought to the attention of Fairbanks, Morse & Co. When it came to Plaintiff's Exhibit 5, which is the trade acceptance, defendant objected to it

> "as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company." (Trans. pp. 83, 85)

The testimony failed to show any authority in Miller to make, execute and deliver this trade acceptance in the name of the defendant, as hereinbefore shown. Defendant knew nothing of such document until some time after it had been executed. There was no basis for its admission.

Respectfully submitted,
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